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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 566

IRVING JOSEPH LEE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered July 21, 1966, wherein a timely motion for rehearing was overruled August 24, 1966.

OPINION BELOW.

The opinion of the Court of Appeals (Appendix, infra) is not yet reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on July 21, 1966, affirming petitioner's conviction under a one count indictment charging a violation of Title 18, U. S. C., Section 2315. Petitioner's motion for rehearing was denied on August 24, 1966. The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1).

QUESTIONS PRESENTED.

1. Whether the Trial Court erred in overruling petitioner's motion to suppress evidence, and in admitting into evidence the matters seized from the petitioner during the search on September 29, 1964, where said search of petitioner was made prior to petitioner's arrest, without a warrant, and the evidence showed that if probable cause existed for the arrest of petitioner, the Government had ample time within which to obtain a warrant, and therefore the subsequent search and arrest were violative of the petitioner's rights under the Fourth and Fifth Amendments to the United States Constitution.

2. Whether the Trial Court erred, under the circumstances of this case, in instructing the jury that it would be justified, if it found that petitioner was in possession of recently stolen property, in inferring that the petitioner had knowledge that the property was stolen unless such possession was explained to the satisfaction of the jury; and whether such instruction improperly shifted the burden of proof in this cause and improperly required such explanation of possession to be proved to the satisfaction of the jury.

RULES AND CONSTITUTIONAL PROVISIONS INVOLVED.

1. Fourth Amendment, U. S. Const., provides as follows: "The right of the people to be secure in their persons,

houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized."

2. Fifth Amendment, U. S. Const., provides in pertinent part:

"No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

STATEMENT.

Petitioner Irving Joseph Lee was charged in an indictment with having, on the 29th day of September, 1964, received and concealed stolen securities having a value of more than $5,000.00, which were moving as and constituted interstate commerce from the State of Illinois to the State of Missouri, which were at the time of receiving and concealing the securities, known by him to be stolen, all in violation of Title 18, U. S. C., § 2315. Following a verdict of guilty by a jury, petitioner received a three-year sentence of imprisonment (Tr. 147).[1]

The facts giving rise to the indictment are as follows: The Fairview State Banking Company, Fairview, Illinois, was burglarized some time between May 2 and May 4, 1964. The vault had been opened and nineteen safety deposit boxes were rifled, and upon examination certain United States Series "E" Savings Bonds and shares of corporate stock were found to be missing from some of the boxes (Tr. 10-16, 23-31).

On September 18, 1964, some four and a half months after said burglary, the office of the Federal Bureau of

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[1] References herein to the transcript of the proceedings of the trial proper will be designated "Tr." References to the transcript of the proceedings on the hearing of the motion to suppress will be designated "M".

Investigation in St. Louis began a surveillance of petitioner, because it had on said date received information from a confidential source that petitioner was offering stolen securities for sale (M. 8-9). An investigation of petitioner was initiated and the government agents ascertained where petitioner lived and what kind of automobile he drove, learned that his house was up for sale, and that he was an ex-bookmaker (M. 9). His home and his automobiles were observed (M. 10). During the next ten days more information about petitioner was received from the same confidential source. During this period the F. B. I. learned that the securities which petitioner was attempting to sell had been stolen from an Illinois bank (M. 32-33): On September 28, 1964, the F. B. I. learned that petitioner would be in Schulte's Restaurant on Twelfth Street in St. Louis (M. 11). For a large part of that afternoon, the petitioner was under surveillance and was surveilled at said restaurant on said date, in the company of another person (M. 5-6, 36). On that evening after the meeting in the restaurant, Federal Agents received further information from the confidential informer (M. 37). The same informant had given the F. B. I. information in other matters, and such information had proved reliable (M. 34-35).

On the following morning, September 29, 1964, an F. B. I. agent went by petitioner's home and learned that petitioner's automobile was at home. Some time during the afternoon of September 29, the F. B. I. received information that petitioner was probably going to sell the securities or dispose of them at the St. Louis airport that evening (M. 14, 46).

The agent in charge of the F. B. I. office spoke to the United States Attorney during the afternoon or early evening of September 29, 1964 about the issuance of a warrant, but no application was made to the United States Commissioner for the issuance of a warrant for

the arrest of petitioner (M. 45, 47, 48). In fact, at no time between September 18, 1964, and September 29, 1964, was an application made for a warrant for the arrest of petitioner (M. 12, 13, 42, 57).

Instead, at about 7:00 P. M. on September 29, 1964, nine special agents of the Federal Bureau of Investigation proceeded to the airport in St. Louis and stationed themselves at various places inside and outside the airport building (M. 16-18). At about 9:30 that night, petitioner was seen to enter the airport lobby carrying a tan leather briefcase (M. 19). After sitting in a lounge chair for about five minutes, he walked to a stairway and descended to a lower level, heading toward the East Concourse. Agent Smith then touched petitioner on the shoulder, identified himself as an F. B. I. agent, and asked petitioner for identification (M. 20; Tr. 43). Petitioner identified himself as "Irv Lee" and produced credentials. Petitioner was then asked what he had in the briefcase and he replied that he did not know. Agent Smith then took the briefcase from petitioner and handed it to Agent Morley (M. 23). Agent Morley opened the unlocked briefcase and briefly glanced at its contents. Agent Smith then placed petitioner under arrest, and escorted him to the first aid room at the airport, where he was again informed that he was under arrest.[2] There

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[2] The opinion rendered by the Eighth Circuit Court of Appeals (appendix, infra) states that agent Smith placed petitioner under arrest **prior** to taking the briefcase from petitioner. The Court of Appeals seemingly relies upon the Government's statement of the case (M. 20, 23). This mistake of fact was either inadvertent on the part of the Government or a significant misquote of the evidence adduced at trial, as shown below.

On recross-examination of F. B. I. agent Smith, the following question and answers occurred (Tr. 47):

> "Q. Now, when did you place Mr. Lee under arrest?
> A. After we looked into the bag and saw there were bonds there, I notified him that he was under arrest."

Subsequently, the government on redirect examination (second redirect examination of Smith by the Government) of Agent Smith attempted to impeach or clarify agent Smith's

the briefcase was opened by Agents Morley and Walls and the contents examined and found to contain a quantity of United States Series E Savings Bonds and certain other securities, which had been contained in the safety deposit boxes in the Fairview Bank prior to the burglary (Tr. 23-31, 74-76; M. 25-26).

Petitioner was also searched, and on his person were found a key to the briefcase, a brown paper bag, and a white envelope (Tr. 60-62). The envelope contained the following writing: "F 71" and "R 849", "gate", "Lee" (Tr. 62). Petitioner was then taken to the F. B. I. office, where there was a continuation of the search of his person (M. 30).

All of these exhibits, the briefcase, the key, the envelope, the paper bag, and the bonds and securities contained in said briefcase were introduced and admitted into evidence over the objection of the petitioner (Tr. 38-39, 63, 76, 77).

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previous answer concerning when petitioner was placed under arrest.

The following question and answers occurred:

"Q. What is the first thing you did when you found Mr. Lee on the concourse?

A. The first thing I did, I asked him for identification.

Q. What was the next thing?

A. Let me correct that. I first identified myself, told him who I was, and then asked him for identification.

Q. What was the next thing?

A. Then I asked him, what was in the bag, and then after that we looked into the bag.

Q. Then you placed him under arrest?

A. Yes, sir.

Q. Immediately?

A. Yes, sir" (Tr. 47-48).

An examination of the cross-examination of F. B. I. agent Morley substantiates the fact that petitioner was placed under arrest **after** the seizure of the briefcase and **after** the contents of the briefcase were examined (Tr. 56). The Government seemingly now takes the position that he was placed under arrest prior to said search; however, the Government mistakenly relies upon testimony taken before the court on the motion to suppress (M. 20, 23) and not the testimony adduced at trial.

Evidence was also introduced that Trans World Airlines Flight Number 71, which originated at New York, was scheduled to arrive on September 29, 1965, at 8:49 p. m., but arrived at 9:58 (Tr. 83-84).

Motions for judgment of acquittal were filed at the close of the Government's case and at the close of the entire case (Tr. 88-88a).

Petitioner offered no evidence below.

In its charge to the jury, the Trial Court instructed the jury as follows:

> "Possession of property recently stolen, **if not satisfactorily explained**, is a circumstance from which the jury may reasonably draw the inference and find in the light of surrounding circumstances that the person in possession knew the property had been stolen" (emphasis added) (Tr. 125).

The Court also instructed the jury that:

> "If you find from the evidence beyond a reasonable doubt that the goods described in the indictment were stolen, and that, while recently stolen, the property was in the possession of the accused, the jury would be justified in drawing from those facts the inference that the goods were possessed by the accused with knowledge that the property was stolen, unless possession by the accused of the recently stolen property **is explained to the satisfaction of the jury** by other facts and circumstances in evidence" (emphasis added) (Tr. 125).

The petitioner immediately objected and excepted to such instructions as follows:

> "The defendant would except to the instruction which the court discussed the inference to be drawn

from the possession of property recently stolen, and particularly to the third paragraph of the instruction which reads in part 'the jury would be justified in drawing from those facts the inference that the goods were possessed by the accused with knowledge that the property was stolen, unless possession by the accused of the recently-stolen property is explained to the satisfaction of the jury by other facts and circumstances in evidence.'

"It would be the contention of the defendant that this instruction given in this case, where there was no evidence offered by the defendant and no testimony offered by the defendant, this instruction constitutes a comment on defendant's failure to testify and is therefore violative of the defendant's constitutional right not to give testimony against himself under the Fifth Amendment.

"It would further be the contention of the defendant that the latter portion of the third paragraph of this instruction which says that 'unless possession by the accused of the recently stolen property is explained to the satisfaction of the jury', that that portion of the instruction shifts the burden of proof from the prosecution to the defendant, contrary to the rule that the burden of proof can never shift in a criminal case, and defendant would also object to this portion of the instruction which requires the defendant to explain the possession 'to the satisfaction of the jury', because if there was any burden placed upon the defendant to explain possession, he should not have to do so to the satisfaction of the jury. This creates a burden upon the defendant greater than the inference requires" (Tr. 131-132).

REASONS FOR GRANTING THE WRIT.

I. The Court erred in overruling the petitioner's motion to suppress evidence, and in admitting into evidence the matters seized from the petitioner during the search on September 29, 1964, for the reasons that said search of petitioner was made prior to petitioner's arrest, without a warrant, and the evidence showed that if probable cause existed for the arrest of petitioner, the Government had ample time within which to obtain a warrant, and therefore the subsequent arrest and search were violative of the petitioner's rights under the Fourth and Fifth Amendments to the United States Constitution.

Admitted into evidence below were certain United States Government Bonds and stock certificates which were seized from petitioner on September 29, 1964. Also admitted into evidence was the briefcase which petitioner was carrying on that day, and a key, envelope, and paper bag seized from his person on that date (Tr. 39, 63, 77).

We think that the search of petitioner on September 29, 1964, prior to his arrest and without a warrant either for his arrest or for the search, constitute an unreasonable search and seizure in violation of the Fourth Amendment, and that the introduction of such evidence thus forcefully seized from petitioner further required him to give evidence against himself in a criminal cause, in violation of the Fifth Amendment.

The search and subsequent arrest took place eleven days after Government agents received information from a confidential source, which it considered reliable, that petitioner was offering for sale securities which had earlier been stolen from an Illinois bank (M. 8-9, 32-33, 34-35). During the eleven day period, petitioner was held under surveillance and during said period of time the Government received much information from the same confidential source (M. 11).

On the day prior to the search, the Government learned from its confidential source that petitioner would be in a certain restaurant in St. Louis on that date. Petitioner was placed under surveillance a large part of that afternoon and during the time he kept an appointment at the restaurant (M. 5-6, 36). After the meeting in the restaurant, the Government received information that the man from whom petitioner had accepted the stolen bonds and stocks was close by in St. Louis (M. 56).

During the afternoon of September 9, the Government's confidential source related to the Government that petitioner was probably going to sell the bonds or dispose of them at the airport that evening (M. 14).

It is undisputed that at no time between September 18, 1964 and the time of the search and arrest of petitioner was an application made for the issuance of an arrest warrant or a search warrant (M. 12-13, 57). Although there was some discussion between the agents of the FBI and the United States Attorney relative to the investigation (M. 45-48), nevertheless no application was at any time made to any Judge or Commissioner for the issuance of such warrants. The United States Commissioner was available for such application, but no application was made to him (M. 53-54).

Instead nine agents of the F. B. I. at about 7:00 p. m. that night proceeded to the St. Louis airport and without any warrant proceeded to search the petitioner's briefcase and then arrest him. Thereafter the person of the petitioner was searched (Tr. 43, 47, 56; M. 20, 23).

> "The statutory authority of FBI officers and agents to make felony arrests without a warrant is restricted to offenses committed 'in their presence' or to instances where they have 'reasonable grounds to believe that the person to be arrested has committed or

> is committing' a felony. 18 U. S. C., § 3052. . . . The Statute states the constitutional standard, for it is the command of the Fourth Amendment that no warrants for either searches or arrest shall issue except 'upon probable cause, supported by oath of affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'" **Henry v. United States**, 361 U. S. 98, 100.

It is important that the requirement of probable cause be strictly enforced for the standards set by the Constitution protects both the officer and the citizen. If the officer acts with probable cause, he is protected even though it turns out the citizen is innocent. **Carrol v. United States**, 267 U. S. 132, 156. And while a search without a warrant is, within certain specific limits, permissible if incident to a lawful arrest, if an arrest without a warrant is to support an incidental search, it must be made with probable cause. **Carrol v. United States**, 267 U. S. 132, 155-156. "This immunity of officers cannot be fairly enlarged without jeopardizing the privacy or security of the citizens." **Henry v. United States**, 361 U. S. 98, 102.

The search of petitioner was valid only if incident to a lawful arrest. Further, the arrest was lawful only if it was made with probable cause.

Here the search was made **prior** to petitioner's arrest. Agent Smith took the brief case from petitioner and handed it to Agent Morley (M. 23). Agent Morley then opened the unlocked briefcase and briefly glanced at its contents. Agent Smith then placed petitioner under arrest (Tr. 47-48, 56).

This Court has never held that the teachings of the Fourth Amendment permit Federal Agents to conduct a search and subsequently make an arrest. Admittedly, a

lawful arrest, if made with probable cause, will support a search. A search, however, does not support an arrest. The protection given by the Fourth Amendment would be greatly reduced if police officers are allowed to conduct warrantless searches, prior to making an arrest. If this were allowed, police officers, upon finding incriminating evidence, could look in retrospect and decide whether they had "probable cause" to make an arrest. Surely, this may very well have happened in the instance case.

Although the FBI had conversation during the afternoon or early evening of September 29, 1964, with the United States Attorney about the issuance of a warrant, no application was made to the United States Commissioner and no warrant was issued (M. 45). Clearly, the United States Commissioner was available if the FBI or United States Attorney thought they could obtain a warrant. If they didn't think they could obtain a warrant from the United States Commissioner, then they must not have thought they had probable cause until the time when Agent Morley opened the briefcase. This being true, the search was invalid.

If the Government had probable cause for the arrest and search of the petitioner, such probable cause existed long before 9:30 p. m. on September 29, 1964. Clearly, under such circumstances, the Government should not be given the power indiscriminately to effectuate searches and seizures without the protective safeguard of having a neutral magistrate determine whether such search or arrest shall occur. As stated in **Aguilar v. Texas**, 378 U. S. 108, 110, 111:

> "'[T]he informed and deliberate determinations of magistrates empowered to issue warrants . . . are to be preferred over the hurried action of officers . . . who may happen to make arrests.' United States v. Lefkowitz, 285 U. S. 452, 464. The reasons for this

rule go to the foundations of the Fourth Amendment. A contrary rule 'that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.' Johnson v. United States, 333 U. S. 10, 14. Under such a rule 'resort to [warrants] would ultimately be discouraged.' Jones v. United States, 362 U. S. 257, 270 . . . . Although the reviewing court will pay substantial deference to judicial determinations of probable cause, the court must still insist that the magistrate perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police."

Thus, if probable cause exists in ample time to allow police officers to obtain a warrant, they must do so. Where there is no reasonable ground for not obtaining the warrant, the subsequent search and seizure are illegal. **Chapman v. United States**, 365 U. S. 610; **United States v. Wallace**, D. C. D. C., 160 F. Supp. 859. Thus, there is no option extended to a law enforcement officer of making an arrest and search without a warrant, as the government chooses. If such were the law, that is, if the officer's own determination that he has probable cause to arrest and search is sufficient to legalize the arrest and search, an application would never be made for the issuance of the warrant, and the very essence of the Fourth Amendment would be flouted and contravened. This is significant in the instant case because the FBI and the United States Attorney decided against making application for a warrant, possibly because they did not think there was sufficient probable cause.

The reasons for requiring an application to be made to a disinterested magistrate are sound. For "[a]n arrest

without a warrant by-passes the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search . . . " **Beck v. Ohio**, 379 U. S. 89, 96.

Certainly the mere fact that officers have evidence which might support a magistrate's determination that a warrant should issue is insufficient to justify a search and arrest without a warrant, and thereby permit an *ex parte* determination by one of the parties to a controversy, namely the Government, in complete disregard of the proscriptions of the Fourth Amendment. In **Johnson v. United States**, 333 U. S. 10, information as to the possibility that an offense was being committed was not learned by Federal agents until 7:30 p. m. An arrest and search without a warrant was made about 8:30 or 9:00 p. m. The Court reversed the conviction because the Government, having probable cause for the arrest of the defendant, failed to make application for a warrant, but proceeded to arrest and search without a warrant. Such arrest and search were held to have violated the Fourth Amendment, which requires that the evidence asserted to constitute probable cause be submitted to a neutral and detached magistrate before the issuance of the warrant. A law enforcement officer, "engaged in the often competitive enterprise of ferreting out crime" cannot be permitted to determine without judicial control and supervision when a warrant will be issued and when the same will be dispensed with. **Johnson v. United States**, 333 U. S. 10, 14. If such were the rule, resort to warrants would ultimately be discouraged. **Jones v. United States**, 362 U. S. 257, 270.

> "In a doubtful case, when the officer does not have clearly convincing evidence of the immediate need to search, it is most important that resort be had

to a warrant, so that the evidence in the possession of the police may be weighed by an independent judicial officer, whose decision, not that of the police, may govern whether liberty or privacy is to be invaded." **Jones v. United States**, 362 U. S. 257, 270.

The Government and Eighth Circuit Court of Appeals rely upon **United States v. Rabinowitz**, 339 U. S. 56. However, such case is not applicable here. There the Government, having obtained information that the accused had sold forged currency, obtained a warrant for his arrest. Thereafter, with such warrant for arrest, the Government agents proceeded to the accused's one room office, placed the defendant under arrest and thereafter searched his office and seized the forged instrument. The conviction was upheld since there the evidence was properly seized, and the officers held a warrant for the arrest of the defendant which was broad enough to warrant the search and seizure effectuated.

The protection of the Fourth Amendment is abrogated if the police officer is in all circumstances permitted to infer guilt from certain information and therefore be permitted to effectuate a search and seizure. The constitutional guarantee is observed only where a detached judicial officer is permitted to appraise and determine the sufficiency or probable cause of the evidence submitted to him. **Johnson v. United States**, 333 U. S. 10.

This Court has recently upheld the **Johnson** case in **Chapman v. United States**, 365 U. S. 610, 614. This court determined in **Chapman** that "we think it must be concluded here, as it was in Johnson, that 'if the officers in this case were excused from the constitutional duty of presenting their evidence to a magistrate, it is difficult to think of a case in which it should be required.'" **Chapman v. United States**, 365 U. S. 610, 615-616.

Mr. Justice Frankfurter's concurring opinion refers to the majority opinion in the **Chapman** case as confusing. He states that "the reasoning by which the Court reaches its result would be warranted were **Trupiano v. United States**, 334 U. S. 699, still law." Mr. Justice Frankfurter is of the opinion that the majority opinion, although not explicitly relying on **Trupiano**, actually followed the **Trupiano** decision. Further, Mr. Justice Frankfurter stated that **Trupiano** had been specifically overruled in **United States v. Rabinowitz**, 339 U. S. 56.

In the instant case the Government for an eleven day period had information from an allegedly reliable source that the petitioner was offering stolen securities for sale, and though hours prior to the arrest the Government had information from the same source that the petitioner would have said securities in his possession, the Government chose to make no attempt whatever to submit such information for a "magistrate's disinterested determination". The Government chose not to permit the United States Commissioner to exercise his "neutral and detached" function of determining whether probable cause existed for the arrest and/or search of the petitioner. See **United States v. Lefkowitz**, 285 U. S. 452, 464. The Government chose rather to stop the petitioner, make a search, thereafter arrest him, and use the fruits of said search in a criminal prosecution. For the failure of the agent to have applied for such warrant under the circumstances of this cause, it is submitted that the search and seizure were invalid, and that the lower court erred in failing to sustain petitioner's motion to suppress the evidence, and in permitting such evidence to be introduced below.

The Court of Appeals' opinion states that "the constitutional validity of the search in this case, then, must depend upon the constitutional validity of Lee's arrest,

which depends in turn upon whether, at the moment the arrest was made the FBI agent had probable cause to make it" (App. infra). It is submitted this holding is contra to this Court's decision in **Chapman v. United States**, 365 U. S. 610.

II.

The Court erred, under the circumstances of this case, in instructing the jury that it would be justified, if it found that petitioner was in possession of recently stolen property, in inferring that the accused had knowledge that the property was stolen unless such possession was explained to the satisfaction of the jury. Such instruction improperly shifted the burden of proof in this cause, and improperly required such explanation of possession to be proved to the satisfaction of the jury.

In its charge to the jury, the court instructed as follows:

> "Possession of property recently stolen, **if not satisfactorily explained,** is a circumstance from which the jury may reasonably draw the inference and find in the light of surrounding circumstances that the person in possession knew the property had been stolen" (Tr. 125) (Emphasis supplied).

Later, in the same instruction, the Court said:

> "If you find from the evidence beyond a reasonable doubt that the goods described in the indictment were stolen, and that, while recently stolen, the property was in the possession of the accused, the jury would be justified in drawing from those facts the inference that the goods were possessed by the accused with knowledge that the property was stolen, **unless possession by the accused of the recently stolen property is explained to the satisfaction**

of the jury by other facts and circumstances in evidence'' (Tr. 125) (Emphasis supplied).

Petitioner duly objected and excepted to such instruction (Tr. 131-132).

It is submitted that under the circumstances of this case such instruction was erroneous and in effect directed the jury to find the petitioner guilty. There was no dispute in the evidence that the petitioner on September 29, 1964 had the securities in his possession. Neither was there any dispute that the securities had in May, 1964 been stolen from a bank in Illinois. The defense offered no evidence in this cause, and the petitioner did not testify. When the Court instructed the jury that it could find from the fact of petitioner's possession of these stolen securities, that the petitioner knew that the securities had been stolen, unless possession by the accused is explained ''to the satisfaction of the jury,'' the jury was instructed in effect that the Government had proved all of the essential elements of the offense, and that it must return a verdict of conviction.

Possession of recently stolen property merely permits an inference that the person in possession knew the property to have been stolen. **Harding v. United States**, 8 Cir., 337 F. 2d 254. Such possession permits an inference and no more. **Battaglia v. United States**, 4 Cir., 205 F. 2d 824.

It has been held erroneous to instruct the jury that the possession of stolen goods raises a presumption that the goods have been transported in interstate commerce. **Bollenbach v. United States**, 326 U. S. 607; **United States v. Sherman**, 2 Cir., 171 F. 2d 619; **United States v. Lefkowitz**, 2 Cir., 284 F. 2d 310. For an inference is a mere permissible deduction from the evidence, whereas a presumption is mandatory and establishes the fact to be true, **United States v. Segelman**, D. C. Pa., 86 F. Supp.

114; **Barfield v. United States**, 5 Cir., 229 F. 2d 936, 940. An instruction which places upon the defendant the burden of explaining his possession of recently stolen goods is erroneous. **United States v. Allegrucci**, 3 Cir., 258 F. 2d 70, 73; **Balman v. United States**, 8 Cir., 94 F. 2d 197, 199; **United States v. Lefkowitz**, 2 Cir., 284 F. 2d 310. Such instruction is erroneous, even when it is joined with an entirely proper phrasing in terms of inference. **United States v. Allegrucci**, 3 Cir., 258 F. 2d 70, 73-74; **United States v. Lefkowitz**, 2 Cir., 284 F. 2d 310, 313.

Here, not only did the Court call striking attention to the fact the petitioner had neither offered evidence, by his testimony or otherwise, to explain his possession of the stolen securities, but indeed the Court improperly placed upon the petitioner the burden of proving **to the satisfaction of the jury** the reason for his possession of such property.. See **Kasle v. United States**, 6 Cir., 233 Fed. 878, 889. The term "satisfaction" is part and parcel of the concept of burden of proof. See **Marks v. United States**, 10 Cir., 260 F. 2d 377, wherein, in discussing the Government's burden of proof, the trial court repeatedly told the jury that the Government must prove every element of the offense "to the jury's satisfaction beyond a reasonable doubt."

It has been generally held improper to use the word "satisfy" either alone or with qualification in instructions as to the degree of proof required. 88 C. J. S., Trial, Section 370, p. 949. Thus, it has been held that there is no doubt that an instruction which requires plaintiff or defendant to prove an issue "to the satisfaction of the jury" is erroneous. **Lebow v. Missouri Public Service Company**, Mo. Sup., 270 S. W. 2d 713, 718.

In **Padgett v. Missouri Motor Distributing Corporation**, Mo. Sup., 177 S. W. 2d 490, 492, it was held that the ad-

dition of the requirement that the proof must be to the satisfaction of the jury in order to sustain a recovery was improper as tending to increase the burden of proof.

Again, in **Seago v. New York Cent. R. Co.**, Mo. Sup., 164 S. W. 2d 336, 341, the instruction on the burden of proof required the plaintiff to prove its case "to your satisfaction by a preponderance or greater weight of the evidence." Of this instruction, the Court said:

> "Webster's New International Dictionary, 2d Ed., defines satisfaction as 'the act of satisfying'; 'the state of being satisfied'; and defines satisfy as 'to free from doubt, suspense or uncertainty'; 'to give assurance to'; 'to set at rest the minds of'; 'to convince'.
>
> "Such instruction . . . has been, it seems, generally condemned."

Is it not clear that if an accused is required to explain his possession of stolen property to the satisfaction of the jury, he is being required affirmatively to set the mind of the jury at rest with regard to his possession, and to free the jury from any doubt or uncertainty with regard thereto? Does this not in reality constitute a shifting of the burden of proof from the government to the defendant? If, as indicated above, the mere insertion of the phrase "to the satisfaction of the jury" invalidates a burden of proof instruction, since it improperly increases the burden of proof otherwise properly placed upon a litigant, does not the use of such phrase invalidate an instruction which places such burden upon an accused who has no burden of proof whatever.[3]

The Eighth Circuit's ruling failed to consider the petitioner's argument that the use of the word "satisfaction"

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[3] See suggested instruction in f/n 2, **United States v. Lefkowitz**, 2 Cir., 284 F. 2d 310, 314.

when used in the context of the instructions and in the circumstances of the case, created a shifting of the burden of proof, and indeed placed on the petitioner the burden of explaining his possession to the jury's satisfaction.

The Eighth Circuit's opinion holds that "The Court specifically instructed that the burden of proof remains on the Government throughout the trial and does not shift at any time to the defendant" (Appendix, infra). This did not correct the error here, however, just as it did not correct the error in **United States v. Lefkowitz**, 2 Cir., 284 F. 2d 310, 314.

If, as indicated, civil judgments have been ruled erroneous by thus improperly increasing the civil litigant's burden of proof, *a fortiori* a conviction of a criminal offense should not be permitted to stand where a defendant is shackled with a burden of proving his innocence, and to such an extent as to leave no doubt in the juror's mind of the validity of the defendant's explanation.

The instruction here could only have impressed upon the jury the fact that the petitioner not only made no proof to their satisfaction, but indeed made no proof at all. The instruction constituted a directed verdict of guilt, and is reversibly erroneous.

CONCLUSION.

For the reasons stated hereinabove, we respectfully submit that the petition for a writ of certiorari should be granted.

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APPENDIX.

Opinion of Court of Appeals.

United States Court of Appeals
for the Eighth Circuit.

No. 18,184.

Irving Joseph Lee, Appellant,

v.

United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[July 21, 1966.]

Before Van Oosterhout, Blackmun and Gibson, Circuit Judges.

Gibson, Circuit Judge.

Irving Joseph Lee was charged in an indictment with having, on the 29th day of September, 1964, received and concealed stolen securities having a value of more than $5,000, which were moving as and constituted interstate commerce from the State of Illinois to the State of Missouri and which he knew at the time of receiving and concealing the securities that they were stolen, all in violation of Title 18, U. S. C. § 2315. Following a verdict of guilty by a jury, he received a three-year sentence of imprisonment. A timely appeal was filed by him.

The facts giving rise to the indictment are as follows: The Fairview State Banking Company, Fairview, Illinois, was burglarized sometime between May 2 and May 4, 1964. The vault had been opened and nineteen safety deposit boxes were rifled, and upon examination certain United States Series E Savings Bonds and shares of corporate stock were found to be missing from some of the

boxes. On September 18, 1964, the Federal Bureau of Investigation office in St. Louis received information from a confidential source that Lee was offering stolen securities for sale. Upon receipt of this information, the F. B. I. began a "loose" surveillance of Lee and ascertained where he lived, what kind of automobile he drove, learned that his house was up for sale and that he was an ex-bookmaker. During the following ten days more information was received about Lee from the same confidential source. The F. B. I. was informed that the securities which Lee was attempting to sell had been stolen from the burglarized bank in Illinois, and upon learning on September 28, 1964, that Lee would be in a certain restaurant on 12th Street in St. Louis, Missouri, again placed him under surveillance and found him in the company of another person, but he did not have any package, brief case or any type of folder that could have contained the stolen securities. The evening after that meeting in the restaurant, the F. B. I. received further information from the same confidential source, which had proved reliable in the past on other matters. Acting on this information, Agent Smith of the F. B. I., who for the first time saw Lee in the restaurant, went the next morning by Lee's home and found Lee's automobile there. During the afternoon of September 29, 1964, the F. B. I. received information that Lee was probably going to sell the securities or dispose of them at the St. Louis airport that evening. This was the first information that the F. B. I. had received that Lee would be at some specific place at a designated time with the securities actually in his possession. This information was disclosed to the United States Attorney in the late afternoon of September 29, 1964, but no application was made to the United States Commissioner for the issuance of a warrant for the arrest of Lee. At about 7:00 p. m. that same evening nine Special Agents of the F. B. I. proceeded to the airport in

St. Louis, Missouri, and stationed themselves at various places inside and outside the airport building. At about 9:30 that evening Lee entered the airport lobby, carrying a tan leather brief case. He sat in a lounge chair for about five minutes, walked to a stairway, descended to a lower level and headed toward the east concourse, which contains rooms for departing and deplaning air passengers. At this point Agent Smith touched Lee on the shoulder, identified himself as an F. B. I. Agent, and asked Lee for identification. Lee responded he was "Irv Lee" and produced his credentials. Lee was then asked what he had in the brief case and he replied that he did not know. Agent Smith then placed Lee under arrest, took the brief case from him, handed it to Agent Morley, who opened the unlocked brief case, and briefly glanced at its contents. The agents escorted Lee to the First Aid room at the airport, where he was again informed that he was under arrest. The brief case was again opened and contained therein was found a number of United States Series E Savings Bonds and other securities, which had been in the safety deposit boxes in the Fairview Bank prior to the burglary. The face value of these securities was approximately $100,000.00. Lee was also searched and on his person were found a key to the brief case, a brown paper bag, and a white envelope on which was written "F 71", "R 849", "gate", and "Lee". After this search Lee was taken to the F. B. I. office. All of these exhibits, the brief case, the key, the envelope, the paper bag, and the bonds and securities contained in said brief case were introduced and admitted into evidence over the objection of Lee.

Evidence was also introduced that Transworld Air Flight 71, which originated in New York, was scheduled to arrive on September 29, 1964 at 8:49 p. m. but did not arrive until 9:58 p. m. It departed for Tulsa, Oklahoma, at 10:35 p. m. on the next leg of its flight.

Prior to trial, Lee filed a motion to suppress the evidence obtained as a result of the search made of his person on September 29, 1964, on the basis that said search and arrest were made without warrant; that if probable cause existed for the arrest of Lee, the Government had ample time to obtain a warrant; and that the subsequent arrest and search were violative of Lee's rights under the Fourth and Fifth Amendments to the United States Constitution. This motion was overruled by the trial court, which ruling Lee claims to be in error.

Lee also contends the Court erred in instructing the jury that it would be justified if it found that Lee was in possession of recently stolen property in inferring that Lee had knowledge that the property was stolen unless such possession was explained to the satisfaction of the jury, contending that such instruction improperly shifted the burden of proof and improperly required such explanation of possession to be proved to the satisfaction of the jury.

The third and last error asserted by Lee is the Court's failure to sustain Lee's motion for judgment of acquittal for the reason that the evidence was insufficient to justify a conviction and did not show that the stolen property was moving as and constituted interstate commerce, from the state of Illinois to the state of Missouri.

We affirm the conviction.

I.

The motion to suppress was properly overruled. F. B. I. Agent Smith had probable cause to arrest Lee as he had reasonable grounds to believe that Lee was committing a felony in his presence when he observed Lee at the time and place indicated by the previously reliable informant. The Agent certainly had facts and circumstances within his knowledge and reasonable trustworthy information

sufficient to warrant a man of reasonable caution to believe that an offense was being committed. Lee does not seriously contend the absence of probable cause for the arrest but complains about the absence of a warrant of arrest. Where there is probable cause for the arrest of a person for a felonious offense, the absence of a warrant is immaterial, and, the arrest being valid, the search and seizure that followed was incidental thereto and valid. The mere fact that the Government might have had sufficient time to obtain a warrant for his arrest would not invalidate an otherwise legal arrest with the ensuing reasonable search and seizure.

Lee cites in support of his position **Johnson v. United States**, 333 U. S. 10 (1948); **Aquilar v. Texas**, 378 U. S. 108 (1964), which cases deal with a search of the defendant's dwelling or his residence. The **Johnson** decision is not applicable as it applies to the search of a person's home admittedly made without probable cause where the Government attempts to justify the arrest by the search while justifying the search by the arrest. This was condemned by a 5-4 Court. But as noted in **Johnson**, pp. 14 and 15 of 333 U. S.

> "There are exceptional circumstances in which, on balancing the needs for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with. But this is not such a case. * * * No suspect was fleeing or likely to take flight. The search was of permanent premises, not of a movable vehicle. No evidence or contraband was threatened with removal or destruction * * *"

Aquilar is not applicable as it is concerned with a defective conclusionary warrant for search of a private dwelling. Lee cites no cases that advance the proposition that the arrest of an individual in a public area and a

search of his person incidental thereto, based upon probable cause, is invalid, without a warrant where it had been practicable to obtain a warrant. As noted in **Lefkowitz v. United States**, 285 U. S. 452 (1932) at 465 and 466:

> "The decisions of this court distinguished searches of one's house, office, papers or effects merely to get evidence and to convict him of crime from searches such as those made to find stolen goods for return to the owner, * * *"

The Supreme Court in **United States v. Rabinowitz**, 339 U. S. 56 (1950), approved the subsequent search of the defendant's business premises, which were open to the public, without a warrant after a valid arrest made with a warrant. The search and seizure were incidental to the valid arrest and the officers were not bound to procure a search warrant, even though they had time to do so. The Court in addressing itself to this point stated at page 65:

> "It is appropriate to note that the Constitution does not say that the right of people to be secure in their persons should not be violated without a search warrant if it is practicable for the officers to procure one. The mandate of the Fourth Amendment is that people shall be secure against unreasonable searches. * * *"

We find that Lee's arrest in a public place based on probable cause and the subsequent search that was incidental to the arrest was not an unreasonable search and seizure in violation of the mandate of the Fourth Amendment to the United States Constitution,[1] and the fruits of

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[1] The Fourth Amendment to the Constitution reads:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

that search were properly admitted in evidence. An arrest warrant is not required even though there may be time to obtain one when the ensuing arrest is based upon probable cause. The test is one of probable cause for the arrest. See **Ford v. United States,** 352 F. 2d 927 (D. C. Cir. 1965). F. B. I. officers and agents may make felony arrests "without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony." 18 U. S. C., § 3052. It is interesting to note that the old § 3052 demanded as a condition to arresting felons without a warrant that there be "a likelihood of his escaping before a warrant can be obtained for his arrest" **United States v. Coplon,** 185 F. 2d 629 (2 Cir. 1950), cert. denied 342 U. S. 920 interpreted this section as requiring a warrant for arrest when there was time to obtain one. Following this decision, in 1951 Congress amended § 3052 and in doing so eliminated the requirement of "a likelihood of his escaping before a warrant can be obtained for his arrest." This evinced an intent on the part of Congress to allow F. B. I. agents to effectively arrest without resort to a warrant whenever proper probable cause otherwise existed, and was undoubtedly enacted in the interest of more effective law enforcement.

In discussing probable cause and the standard to be applied in determining probable cause for an arrest, the Supreme Court in **Brinegar v. United States,** 338 U. S. 160 (1949) said at 175:

> "In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians, act. The

standard of proof is accordingly correlative to what must be proved.

"'The substance of all definitions' of probable cause 'is a reasonable ground for belief of guilt.' **McCarthy v. De Armit,** 99 Pa. St. 63, 69 quoted with approval in the Carroll opinion. 267 U. S. at 161. And this 'means less than evidence which would justify condemnation' or conviction * * * [and] has come to mean more than bare suspicion: Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. **Carroll v. United States,** 267 U. S. 132, 162."

We realize as stated in **Beck v. Ohio, 379 U. S. 89** (1964), that there are limits to the permissible scope of a warrantless search incident to a lawful arrest but we proceed on the premise that if the arrest itself was lawful those limits were not exceeded in the case at bar. And again paraphrasing **Beck,** the constitutional validity of the search in this case, then, must depend upon the constitutional validity of Lee's arrest, which depends in turn upon whether, at the moment the arrest was made the F. B. I. agent had probable cause to make it. We think the agent had reasonable, trustworthy information sufficient to warrant a prudent man in believing that Lee had committed and was committing the offense of transporting stolen securities in interstate commerce.

II.

Part of the Court's charge to the jury is as follows:

"Possession of property recently stolen, if not satisfactorily explained, is a circumstance from which the

jury may reasonably draw the inference and find in the light of surrounding circumstances that the person in possession knew the property had been stolen * * *."

"If you find from the evidence beyond a reasonable doubt that the goods described in the indictment were stolen, and that while recently stolen, the property was in the possession of the accused, the jury would be justified in drawing from these facts the inference that the goods were possessed by the accused with knowledge that the property was stolen, unless possession by the accused of the recently stolen property is explained to the satisfaction of the jury by other facts and circumstances in evidence."

We think this is a fair statement of the law under the circumstances of this case. The Courts have uniformly held that the possession of the fruits of crimes by an individual recently after the commission of the crime justifies the inference that the possession is with knowledge that the property was stolen. This does not raise a presumption but only an inference from which the jury may find guilty knowledge, unless such possession is explained to the satisfaction of the jury by other facts and circumstances in evidence. See **Rugendorf v. United States**, 376 U. S. 528, 536-537 (1964); **Herman v. United States**, 289 F. 2d 362, 367 (5 Cir. 1961). The charge did not say that the defendant must explain the possession to the satisfaction of the jury but only that other facts or circumstances as shown in evidence are to be taken into consideration in determining whether possession of stolen property is consistent with innocence or justifies this inference of guilty possession. The Court specifically instructed that the burden of proof remains on the Government throughout the trial and does not shift at any time to the defendant. In **Harding v. United States**, 337 F. 2d 254, 257 (8 Cir.

1964), we approved a similar charge and held that the charge did not have the effect of placing the burden on the defendant to prove his innocence and that the burden of proof did not shift by this type of charge "* * * which only permitted, but did not require, the jury to infer from appellant's possession of the [stolen] automobile that he had transported it in interstate commerce."

Lee also contends that the almost five-month lapse of time from the time of the burglary of the stolen securities until his apprehension in Missouri was too long a period to warrant a finding of guilty knowledge that the securities had been stolen. In **Van Gorder v. United States,** 21 F. 2d 939 (8 Cir. 1927), the Court held that eighty-seven days lapse of time after the theft of a United States post office letter box key was too long a period to come under the doctrine of possession of recently stolen property. However, the possession of $100,000 of stolen securities is quite different from the possession of a letter box key. Whether possession is sufficiently "recent" to justify an inference of guilt is a question of fact solely for the jury. **Chambliss v. United States,** 218 Fed 154 (8 Cir. 1914); **Boehm v. United States,** 271 Fed. 454 (2 Cir. 1921); **United States v. Allegrucci,** 299 F. 2d 811 (3 Cir. 1962). The facts and circumstances of each case must determine whether the doctrine of possession of recently stolen property is to be applied.[2] We think that five months lapse

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[2] For lapse of time between theft and discovered possession in which the inference of guilty knowledge was permitted to go to the jury, see:

Boehm v. United States, 271 Fed. 454 (2 Cir. 1921) (4 & 9 months);

United States v. Allegrucci, 299 F. 2d 811 (3 Cir. 1962) (3 months);

United States v. DeCarlo, 64 F. 2d 15 (2 Cir. 1933) (3 months);

Carson v. State, 230 Md. 356, 187 A. 2d 103 (1963) (4 months);

State v. Brightman, 252 Iowa 1278, 110 N. W. 2d 315 (5 months);

of time of stolen securities would be well within the permissible time limitation for the application of the doctrine, under the circumstances of this case.

III.

The trial court did not err in overruling Lee's motion for a judgment of acquittal. In order to find Lee guilty as charged under the indictment, the jury was required to find that the securities in question were moving in interstate commerce from Illinois to Missouri on or about September 29, 1964. The admittedly stolen securities had unquestionably at some time moved from Illinois to Missouri and were found in the possession of Lee at the St. Louis airport, and whether the securities were then moving in interstate commerce was a fact question for the jury's determination. See **Parsons v. United States,** 188 F. 2d 878 (5 Cir. 1951). The type of articles possessed, the time lapse from the date they were stolen, the type of possession and the manner in which the articles were handled and in the process of being transported are all factors that the jury can consider in determining whether the articles in question were moving in interstate commerce. We are here concerned with non-negotiable United States Series E Sayings Bonds, which require the signature of the owner for cashing and thus are undeniably difficult to dispose of in the ordinary channels of commerce, and which cannot be legally transferred or negotiated in any manner, thus making it doubly difficult to dispose of in some gainful fashion. This fact would have to be considered in dealing with the time lapse question, together with all the other facts and circumstances in evidence, in determining whether the securities were moving in interstate commerce. The only reason for

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McHenry v. State, 52 Ok. Cr. 20, 2 P. 2d 597 (8 months); State v. Miller, 45 Minn. 521, 48 N. W. 401 (11 months); State v. Jenkins, 213 S. W. 796 (Mo. 1919).

transporting the securities in interstate commerce was to make a sale or some other disposition of them and the interstate character of the securities can and does continue until the reason therefor has been accomplished. The jury here could certainly reasonably find that the securities were still in interstate commerce, as Lee was in the possession of them at the airport with flight information on his person, while he was in the process of approaching the departure and deplaning gate of a scheduled interstate flight. The jury may reasonably conclude from these facts that the stolen securities were in Lee's possession at the time of his arrest pursuant to an attempt by him to sell or otherwise dispose of them and that their interstate character had not terminated at that time. "The verdict of a jury must be sustained if there is substantial evidence, taking the views most favorable to the Government, to support it." (Citations omitted) **Glasser v. United States**, 315 U. S. 60, 80 (1942).

Lee had a fair trial and the evidence is certainly sufficient to warrant the jury in finding him guilty beyond a reasonable doubt. He had the assistance of able employed counsel who adequately represented him and secured for him every legitimate legal benefit to which he was entitled.

The Judgment is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

Judgment.

United States Court of Appeals
For the Eighth Circuit.

Filed Jul. 21, 1966. Robert C. Tucker, Clerk.

No. 18,184.

Irving Joseph Lee,
Appellant,

vs.

United States of America,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri and was argued by counsel.

In consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Irving Joseph Lee, do hereby surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the Mandate of this Court in the District Court.

July 21, 1966.

Order entered in accordance with opinion:—

Robert C. Tucker,
Clerk, U. S. Court of Appeals
for the Eighth Circuit.

United States Court of Appeals
For the Eighth Circuit.

No. 18,184.

Irving Joseph Lee,
Appellant,

vs.

United States of America,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

August 24, 1966.